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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BEN EZRA, WEINSTEIN AND COMPANY, INC.

Plaintiff,

v. **NO. CIV 97-0485 LH/LFG**

AMERICA ONLINE INCORPORATED,

Defendant.

PLAINTIFF'S REPLY MEMORANDUM BRIEF IN SUPPORT OF ITS RULE 56(f) MOTION

Plaintiff Ben Ezra, Weinstein and Company, Inc., by and through its counsel of record, respectfully submits this reply memorandum brief in support of Plaintiff's Rule 56(f) Motion, and states:

INTRODUCTION

Whether Defendant America Online, Inc. ("AOL") is entitled to summary judgment depends entirely on whether it is entitled to the protection of 47 U.S.C.A. § 230 (Supp. 1998), entitled "Protection for private blocking and screening of offensive material." AOL argues that because it is a provider or user of an interactive computer service, it cannot be treated as the publisher or speaker of any information provided by another information content provider, thus shielding it from the defamation and other causes of action asserted by BEW in its First Amended Complaint. *See* 47 U.S.C.A. § 230(c)(1).

The phrases "[I]nteractive computer service" and "information content provider" are terms of art that are defined within Section 230(e). The term "'information content provider' means any

person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." Section 230(e)(3).

AOL alleges that it is entitled to summary judgment because another information content provider, in this case S & P ComStock and/or Townsend Analytics, supplied the erroneous securities information at issue. Therefore, AOL should not be treated as the publisher or speaker of such information. However, AOL concedes, as it must, that "Section 230(c)(1) does not immunize [AOL] from liability for any information that AOL creates itself. . . ." (AOL Mem. Supp. Mot. Summ. J. at 10 n.6) (emphasis added).

AOL also has conceded that it altered the data stream it received from the ComStock/Townsend Database before publishing this information in its Quotes & Portfolio area of its on-line service. (AOL Mem. Supp. Mot. Summ. J. at 4 ¶ 7). However, AOL is quick to allege that the alteration(s) it made was (were) not "substantive." (*Id.*) Alterations that AOL may not consider substantive may be substantive to BEW and this Court. Because no discovery has been conducted, AOL's allegations that its alterations to the stock quote data stream were not " "substantive" are supported wholly by the declarations of two of its employees. (*Id.*)

Thus, the relevant factual inquiry now before the Court in the context of BEW's Rule 56(f) Motion and affidavit is two-fold: (1) whether AOL "provided" the erroneous stock quotation information as alleged by BEW within the meaning of Section 230(c)(1); and (2) whether AOL was responsible, in whole or in part, for the creation or development of the erroneous stock information regarding BEW's securities that AOL then provided through its computer service.

ARGUMENT AND AUTHORITIES

I. RULE 56(f) STANDARDS.

The United States Supreme Court has held that "summary judgment [should] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986). This protection arises when the nonmoving party files an affidavit explaining why he or she cannot present facts to oppose the motion. *Dreiling v. Peugeot Motors of Am., Inc.*, 850 F.2d 1373, 1376 (10th Cir. 1988); *Weir v. Anaconda Co.*, 773 F.2d 1073, 1082 (10th Cir. 1985).

A Rule 56(f) affidavit must be treated liberally unless dilatory or lacking in merit. *Jarvis v. Nobel/Sysco Food Servs. Co.*, 985 F.2d 1419, 1422 (10th Cir. 1993). AOL does not claim that BEW's Rule 56(f) Affidavit is dilatory or lacking in merit. AOL claims that BEW has not made an adequate showing to relief pursuant to Rule 56(f).

In its Memorandum and Order Staying Discovery at 4, this Court noted that BEW "may file a Fed. R. Civ. P. 56(f) affidavit, showing what discovery it wishes to take and how that discovery will assist in defeating" AOL's Motion for Summary Judgment. *See also International Surplus Lines Ins. Co. v. Wyoming Coal Refining Sys., Inc.*, 52 F.3d 901, 905 (10th Cir. 1995) (finding that party opposing summary judgment must state with specificity why extra time is needed and how the additional time and material will rebut the summary judgment motion).

A party requesting additional time must provide an affidavit identifying the facts that are not available, listing the steps taken to obtain these facts, and explaining how additional time will enable him to rebut movant's allegations of no genuine issue of fact. *Committee for the First*

Amendment v. Campbell, 962 F.2d 1517, 1522 (10th Cir. 1992) (citations omitted). The purpose of the affidavit is to ensure that the nonmoving party is invoking the protections of Rule 56(f) in good faith and to afford the trial court the showing necessary to assess the merit of a party's opposition. *Id.* (quotation omitted).

"[S]tated alternatively, [a Rule 56(f) movant should] demonstrate a connection between the information he would seek in discovery and the validity" of the nonmovant's immunity claim. *Lewis v. City of Ft. Collins*, 903 F.2d 752, 758 (10th Cir. 1990) (internal quotation omitted). This is precisely what BEW has done.

II. BEW HAS MET THE NECESSARY SHOWING PURSUANT TO RULE 56(f).

AOL takes another extreme and nonsensical position when it argues, without citation to authority, that "Rule 56(f) plainly requires that the party opposing summary judgment demonstrate, at a minimum, that discovery will probably yield specific facts that will defeat the motion. (AOL's Opp. Rule 56(f) Mot. at 3). The Rule 56(f) affidavit "need not contain evidentiary facts." *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1522 (10th Cir. 1992). No one could possibly meet the burdens imposed by AOL's view of Rule 56(f).

As recognized by the courts, Rule 56(f) necessarily involves some degree of speculation. *See, e.g., Jarvis v. Nobel/Sysco Food Servs. Co.*, 985 F.2d 1419, 1423 (10th Cir. 1993) (noting that Rule 56(f) affidavit should detail evidence party "expected to discover"). After all, if a party opposing summary judgment could state with certainty all evidence that would defeat that motion, it would reduce the well-established rules of discovery to mere excess verbiage. The question is not whether a Rule 56(f) motion and affidavit involves speculation, it is whether the discovery seeks

information that is too speculative or improbable. *See Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1343 (D.N.M. 1995) (noting Rule 56(f) affidavit that engaged in "improbable speculation" would not delay summary judgment, and citing a treatise footnote identifying cases where factual basis was "too speculative").

Under AOL's interpretation of the requirements of Rule 56(f), this Court ruled incorrectly in *RTC Mortgage Trust v. Guadalupe Plaza*, 918 F. Supp. 1441 (D.N.M. 1996) (Black, J.). If AOL's argument is accepted, the *Guadalupe Plaza* court should have denied the defendants' Rule 56(f) motion because their request for all relevant, but undiscovered, bank documents would have been speculative in nature, and therefore not allowed.

Even assuming that AOL is correct when it argues that some kind of higher burden is imposed on BEW because AOL's statutory immunity defense is akin to the qualified immunity (which BEW does not concede), all BEW has to show is a connection between the information BEW seeks in discovery and the validity of AOL's immunity claim. *See Lewis v. City of Ft. Collins*, 903 F.2d 752, 758 (10th Cir. 1990). BEW has made specific references to facts and discovery that go to whether AOL is entitled to statutory immunity. *Id.* at 759. BEW has particularized its requests for discovery. *Id.* BEW also has explained how specific documents or depositions will aid it in rebutting AOL's claim of statutory immunity. *Id.*

BEW provided an affidavit identifying the facts that are not available, and listing the steps it took to obtain these facts. BEW also has explained that additional time and the requested discovery will enable it to rebut AOL's defense based on statutory immunity. Discovery into the specific factual areas set forth in paragraph 21 of BEW's Rule 56 Affidavit goes directly to whether AOL

"provided" the incorrect stock information that it disseminated to its subscribers, and to whether AOL, in whole or in conjunction with ComStock or Townsend Analytics created or developed the erroneous information. See 47 U.S.C.A. § 230(c)(1) and (e).

Notably, AOL made no attempt to address the issues raised by the transcribed statement of its own employee, Jim Hoscheit. (BEW Mem. Supp. Cross-Mot. Sum. J. Ex. A). Hoscheit indicates that AOL requested computer code and that AOL attempted to "put this fix in place". Hoscheit's statement goes on to say that the "fix" attempted by AOL only exacerbated the "decimal truncation error." This statement and further discovery from Hoscheit and other individuals as set forth in Plaintiff's Rule 56(f) Affidavit goes directly to whether AOL or another information content provider "provided" the incorrect stock information.

Rather than address this issue, AOL ignores it. Instead, AOL chooses to rely on statements of two other AOL employees. AOL's citation to case law from the Seventh Circuit, while perhaps historically interesting, ignores controlling case law from the Tenth Circuit. As noted in *Patty Precision v. Brown & Sharpe Manuf. Co.*, 742 F.2d 1260, 1264 (10th Cir. 1984), a party's access to witnesses or material is of crucial importance where the information is likely to be in the sole possession of the opposing party. "Moreover, we have held that 'summary judgment should not be based on the deposition or affidavit of an interested party . . . as to the facts known only to him....'" *Weir v. Anaconda Co.*, 773 F.2d 1073, 1081 (10th Cir. 1985) (internal quotation omitted). Commentators generally recognize that courts should be cautious in granting summary judgment when relevant facts are peculiarly within the knowledge of the adverse party. *Weir*, 773 F.2d at 1082 n.8.

BEW is not so much interested in what AOL's declarants have said as it is in what they have not volunteered regarding how AOL altered the stock quotation data stream. AOL's argument that it could not have altered the data stream because it is prohibited from doing so by its contract with ComStock gives BEW little comfort. Such an argument calls to mind the story of the bank robber who protested his arrest to the arresting police officer just outside the bank. "I couldn't have done it," said the robber as he is led away in handcuffs, "because everyone knows that bank robbery is against the law."

AOL's claim that no discovery should be allowed into the claim that Townsend was acting as AOL's agent is precisely the sort of gamesmanship that Rule 56(f) was intended to avoid. Had AOL been even partially forthcoming regarding its Quotes and Portfolios area and how that information was posted, BEW could have included that allegation in its First Amended Complaint. Now BEW is in the position of seeking to amend its Complaint once again.

AOL does not dispute that some of the discovery sought by BEW goes to whether AOL "produced" the incorrect stock information, including whether problems with AOL's interconnected personal computers altered the ComStock information; what is meant by "Townsend Computers owned by AOL" and whether hardware problems caused the data to be altered; Townsend's access to AOL's interconnected personal computers; the financial and working relationships among AOL, Townsend and ComStock; whether Townsend and/or ComStock are agents, employees or independent contractors of AOL; terms of the agreement between Townsend and ComStock; a description and details of AOL's software that interacts with the stock data so that it can be transmitted to AOL subscribers; how the errors in BEW's stock information actually

occurred; whether AOL software caused or allowed the erroneous reporting of information; and the production of e-mail among AOL, Townsend and ComStock related to the problems. (Pl.'s Rule 56(f) Aff. ¶¶ 21(a), (d), (e), (f), (h), (l), (q), (s) (t)). Contrary to AOL's claims, BEW would be better equipped to oppose AOL's motion for summary judgment if it obtained this discovery, along with the other requested discovery.

III. CONCLUSION

For the foregoing reasons, Plaintiff Ben Ezra, Weinstein & Company, Inc. respectfully requests that the Court deny Defendant America Online, Inc.'s Motion for Summary Judgment, and grant Plaintiff's Rule 56(f) Motion allowing further discovery as requested by the Plaintiff, and for such other relief as the Court deems just and proper.

Respectfully submitted,

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I hereby certify that a copy of the foregoing pleading was mailed to the following counsel of record on this 20th day of August 1998:

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